COMMISSION OF THE EUROPEAN COMMUNITIES

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Commission communication to the Council
concerning cooperation with the United States of America regarding
the application of their competition rules

Proposal for a

COUNCIL DECISION

concluding the Agreement between the European Communities and
the Government of the United States of America regarding the application
of their competition laws

(presented by the Commission)

Commission communication to the Council
concerning cooperation with the United States of America regarding
the application of their competition rules

I. Introduction

The increasing internationalization of the economy, reflected in the steadily growing volume of trade in goods and services, has implications for competition policy. More and more often, practices in other countries can have repercussions within the Community, and it may be difficult to deal with them on the basis of Community rules. For instance, in Community law, one of the criteria governing the application of Articles 85 and 86 of the EC Treaty is that the anti-competitive conduct in question should "affect trade between Member States". In its Wood pulp decision, the Court of Justice accepted that the Community competition rules could apply to undertakings based outside the Community where the conduct in question took place within the Community. However, this approach does not allow effective action and sanctions to be taken against all restrictive conduct originating abroad.

Furthermore, the problems encountered by firms operating at international level (multinationals) often have a global dimension, and the agreements which they conclude may be examined by different competition authorities.

So as to deal with such increasingly international situations, cooperation arrangements must be established between competition authorities that will permit improved coordination where the same cases are handled by a number of authorities and will allow action to be taken against conduct originating in one country and having repercussions in another

This approach allows an effective solution to be found to the problems encountered, while at the same time avoiding the conflicts that may arise from a unilateral reaction based on extraterritoriality. It is for this reason that the Commission considers that cooperation agreements must be concluded between competition authorities.

II. The Agreement between the European Communities and the Government of the United States of America on the application of their competition rules

1. In 1991 the Commission negotiated and signed a cooperation agreement with the US anti-trust authorities (the US Department of Justice and the US Federal Trade Commission). The aim of the agreement is to promote cooperation between competition authorities by encouraging the exchange of information, and to promote dialogue between authorities in accordance with a 1986 OECD recommendation on cooperation in competition matters.

However, the Agreement goes further than the OECD recommendation, for example by incorporating a number of principles established by US case-law in order to restrict excesses in the extraterritorial application of US competition rules (negative comity) and by developing for the first time the concept of positive comity.

Nevertheless, the Agreement is of mainly symbolic value. Although it was signed by the Commission, the latter was bound by the obligations laid down in the Treaty and in the regulations adopted by the Council. This constraint is of particular importance here because of the confidentiality requirement imposed on the Commission under Regulation No 17 (First Regulation implementing Articles 85 and 86 of the EC Treaty), a requirement from which it could not derogate.

2. The conclusion of the Agreement was recently overturned by the Court of Justice, which took the view that it was for the Council to conclude such an act, with the exception of the elements relating to the ECSC Treaty, for which the Commission is competent. The Court did not annul the Agreement itself, and it remains valid in

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international law. In fact, under the Vienna Convention on the law of Treaties (Article 46), an international agreement concluded by an authority which is not "manifestly incompetent" binds the State concerned. In this case, the Commission was not manifestly incompetent as it required a reference to the Court of Justice and nearly three years of procedure for the Court to find finally that the Council was the competent institution. It can therefore be confirmed that under international law the European Communities are bound as regards the United States.

Under Community law, however, the agreement has not been concluded by the competent institution. Measures must therefore be taken rapidly to remedy this shortcoming in Community law. There are two possible solutions: either terminate the Agreement, or ask the Council to conclude it. The Commission must also sign it for the ECSC aspects. Because of the advantages described above which accrue from international cooperation in competition matters, the Commission proposes that the Council choose the second option. For this purpose, a proposal for a Council Decision concluding the Agreement entered into between the European Communities and the Government of the United States of America regarding the application of their competition laws is set out in Annex 1 to this communication.

3. The Commission considers that for the Council to sign the Agreement would in no way alter the scope of the commitments previously entered into. Although the Council may, by concluding an international agreement, derogate explicitly or implicitly from the regulations it has adopted, the Commission believes it is not appropriate to do so at this stage by amending the text of the Agreement. Furthermore, Article XI contains a provision allowing the agreement to be reviewed. The Commission considers that this provision could be invoked in future to allow the Community to conclude a more ambitious agreement (which could, for example, provide in certain circumstances for the exchange of confidential information) in the light of experience with the current Agreement. The US Congress will probably soon adopt legislation allowing agreements to be concluded between competition authorities that provide for the exchange of confidential information.

[redacted]

Annex I

Explanatory memorandum

A. Introduction

1. On 23 September 1991 the Commission negotiated and signed an agreement with the Government of the United States of America regarding the application of EC and US competition laws ("the Agreement"). In a judgment delivered on 9 August 1994, the Court of Justice ruled that the power to conclude such an agreement belonged not to the Commission, but to the Council. However, the Court of Justice did not annul the Agreement, which remains valid in international law. In fact, under the Vienna Convention on the law of Treaties (Article 46), an international agreement concluded by an authority which is not "manifestly incompetent" binds the State concerned. In this case, the Commission was not manifestly incompetent as it required a reference to the Court of Justice and nearly three years of procedure for the Court to find finally that the Council was the competent institution. It can therefore be confirmed that under international law the European Communities are bound as regards the United States.

Under Community law, however, the agreement has not been concluded by the competent institution. To remedy this situation, steps must be taken to correct the deficiency in the procedure under which the Agreement was concluded. There are two possible solutions: either to terminate the Agreement using the procedure provided for in Article XI(2), or to have it approved by the authority that is competent in Community law. Because of the advantages accruing from effective cooperation between competition authorities, it is the second solution which it is proposed the Council adopt. It should be noted that the area covered by the Agreement also includes the competition rules set out in the ECSC Treaty. In as much as the

Commission is comptent to conclude international agreements in this area, the Agreement must be concluded jointly by the Council and the Commission.

2. Community competition policy applies to restrictions of competition affecting trade between Member States and not to those affecting markets in third countries. The gradual lowering and, in some cases, removal of tariff and non-tariff barriers to trade since the 1960s, together with other liberalization measures such as those concerning capital movements, have led to an enormous expansion in international trade. This has important consequences for the application of the competition rules: increasingly, non-Community firms are acting in an anti-competitive manner within the common market. Generally speaking, anti-competitive practices within the Community are often linked to similar practices on other markets, while anti-competitive practices on other markets produce effects within the common market. Similarly, as far as structural changes are concerned, a merger that exceeds the thresholds laid down in the Merger Control Regulation often has effects outside the common market.

Conflicts between the activities of the various competition authorities are therefore highly probable, and it is useful to have a minimum level of communication between authorities in the application of their rules.

B. Description of the Agreement

1. The main objective of the Agreement is not to create a framework within which any conflicts arising between the Commission of the European Communities, on the one hand, and the US Department of Justice and Federal Trade Commission, on the other, may be resolved. The objective is instead to prevent such conflicts from arising by establishing a system of cooperation between the relevant authorities.

2. Article I of the Agreement gives a definition of its scope. As far as the Community is concerned, it covers Articles 85, 86, 89 and 90 of the EC Treaty, Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and

66 of the ECSC Treaty and the implementing regulations adopted on the basis of those provisions.

As far as the United States is concerned, the Agreement covers the Sherman Act, the Clayton Act, the Wilson Tariff Act and part of the Federal Trade Commission Act (Article 1.2ii).

In so far as the scope of these various rules is not the same on both sides of the Atlantic, there is not necessarily a perfect balance in the information to be exchanged: thus, Articles 85 and 86 of the EC Treaty cover sectors that do not fall within the scope of the above-mentioned US acts; on the other hand, Regulation (EEC) No 4064/89 covers only large-scale mergers (i.e. those meeting the threshold criteria specified in the Regulation). This leads to a commensurate reduction in the volume of information which the Commission is liable to supply to the US authorities.[1]

The overall balance of the agreement is satisfactory, particularly given the inclusion of Article II(5) (see below).

3. Article II provides that the other competition authority is to be notified if any of its "important interests" are affected. The Agreement describes some situations in which this test is satisfied. It also defines the point at which notification is required. The general approach here is that notification is to take place at a stage in the proceedings early enough to allow account still to be taken of the other party's opinion.

Paragraph 5 of this Article merits some clarification. It requires notification whenever a competition authority participates in a regulatory or judicial proceeding. It was inserted at the Commission's request in order to rectify the above imbalance, which derives from the wide-ranging scope of Articles 85 and 86 of the EC Treaty. Articles 85 and 86 apply to all sectors of the economy, whereas in the United States

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1 Most of the information exchanged since the entry into force of the Agreement has in fact related to mergers (see point C).

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different sectors are supervised by separate regulatory bodies. But the Department of Justice and the Federal Trade Commission may take part in proceedings before such bodies and, if they do, they will have to notify the Commission accordingly provided that the other conditions laid down in that paragraph are met. The same applies where the Department of Justice or the Federal Trade Commission takes part in judicial proceedings, a possibility not open to the Commission before the national courts.

Article II(6) is to be read in conjunction with Articles VIII and IX, which will be discussed below.

4. Article III is general in scope and provides for the exchange of information and bilateral meetings between the competition authorities in cases other than those specified in Article II. This provision is also subject to Articles VIII and IX.

5. Article IV is more innovative. The parties agree here not only to assist one another whenever their laws, their important interests and the available resources allow, but also - in some cases - where they both have an interest in pursuing enforcement activities with regard to related situations. This clause deals more specifically than the rest of the Agreement with the case already referred to in which anti-competitive conduct on the market of one party may be associated with identical conduct on the market of the other. In such circumstances, the competition authorities of the two parties can profitably coordinate their activities and provide each other with assistance, always to the extent compatible with their respective laws and important interests and provided their resources so permit.

Such coordination may take place even in cases where one party takes the initiative of applying its rules while the other abstains from applying its own rules, and it may also involve sharing the work of enforcement between the parties in accordance with their capabilities. As Article IX of the Agreement recalls, this possibility is subject to compliance with the parties' own laws. The Merger Control Regulation, for example, lays down strict obligations which will prevent these forms of coordination

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in the examination of a merger. A further limitation is imposed by the rules on confidentiality.

6. The Agreement is the first of its kind to consolidate the rules on comity in a legal instrument. Article VI provides as follows: "Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party." This means that party A may refrain from exercising its powers, or may exercise them only in part, provided that it has discretion in the matter and within the limits imposed by its own law. This is to be done in cases where, by exercising its powers, party A would damage party B's interests to a greater extent than it would damage its own interests by taking no action.

The converse may also arise, where a party would be entitled to act but prefers not to and its failure to enforce the rules runs counter to an important interest of the other party. This situation is dealt with in Article V. Known as the "positive comity" clause, it allows a party whose interests are adversely affected by activities within the other party's jurisdiction to bring the matter to the other party's attention. That party might have been unaware of the problem or might not have considered it a priority. Once it is aware of the situation and of the fact that it affects the important interests of the other party, the party notified may, at its own discretion and having due regard to this problem, undertake enforcement of the rules.

The concept "important interests" is defined in Article VI. It must be understood in terms of the purpose of the Agreement, which is the establishment of effective cooperation in the competition sphere. The interests referred to must therefore be important by reference to that objective. However, point 3(e) also mentions the possibility of conflict with the other party's "articulated economic policies". This is intended to ensure that enforcement of the competition rules, whether territorial or extraterritorial, does not run counter to a clearly stated objective of the other party.

7. Article VII, which establishes consultation machinery, calls for little, if any clarification.

8. Article VIII is a fundamental provision which underlies the whole of the Agreement. It states that information can be exchanged under the Agreement only where this does not infringe the rules of confidentiality of either party.

On the Community side, the essential rules here are Article 20 of Regulation No 17 and the corresponding provisions in the other regulations applying the competition rules, where it is stipulated that information which the Commission acquires in the exercise of its powers under the Regulation is to be confidential. In practice, this means that the Commission may not pass on to the US competition authorities information which is freely supplied by firms when they notify agreements or is obtained by the Commission through inquiries or requests for information.

But the Agreement is not thereby rendered devoid of substance. The Commission frequently comes into possession of information which has not been acquired on the basis of Regulation No 17, and it may be that such information can usefully be exchanged with the US competition authorities. For example, the fact that an inquiry involving certain undertakings is in progress is not information which the Commission has acquired using its powers of investigation and is not therefore subject to the obligation in Article 20. Paragraph 2 of the Article VIII should be interpreted in this light: it requires both parties to maintain the confidentiality of information provided to them under the Agreement.

Article IX confirms the general principle that the Agreement does not derogate from the existing rules. It was included because the Agreement was originally signed by the Commission, which, unlike the Council, is not empowered to derogate from the existing regulations.

9. Lastly, Article XI(3) provides that the Agreement can be reviewed within 24 months of its entry into force. This provision has not yet been applied because of the legal

challenge brought before the Court of Justice. However, the Commission does intend to invoke it in future in order to refine the Agreement on the basis of the experience acquired: problems arising in the competition sphere increasingly have an international dimension, and cooperation between competition authorities needs to be intensified in order to deal with them effectively.

C. Practice

1. The practice which has developed since the Agreement was concluded can be summarized as follows (23 September 1991 to 9 August 1994).

- The Commission has sent 61 notifications to the US authorities. Of these, 45 concerned mergers and 16 other matters. In compliance with the Commission's obligation of confidentiality, notifications have been made in a standardized form, giving the names of the undertakings concerned, the reason why proceedings have been initiated and the stage reached in the proceedings.

- The Commission has received 112 notifications from the US authorities, comprising 77 merger cases and 35 other cases.

2. So far no channels have been established for keeping the Member States informed. In the new context, the Commission proposes to set up the following machinery:

- the Member State or Member States whose important interests were found to be affected by reference to the criteria laid down in Article II of the Agreement would be informed of notifications sent to, or received from, the US authorities;

- information on the working of the Agreement would be provided twice a year to a committee of government competition specialists; the meetings would follow bilateral meetings with the US competition authorities. These principles are set out in a Commission statement attached to this proposal.

D. Legal basis

In so far as this Agreement relates to the competition rules of the EC Treaty, the legal basis is Article 87 read in conjunction with Article 228(3), first indent, of the EC Treaty. In fact, the objective of the Agreement is to ensure that Article 85 and 86 of the EC Treaty are observed, which is one of the objectives set out in Article 87(2) of the EC Treaty. This legal basis involves a consultation of the European Parliament. For the aspects covered by the ECSC Treaty, the Commission is competent to ensure the application of the competition rules, including external aspects, as a consequence of the AETR jurisprudence.

E. Conclusion

The Commission accordingly proposes that the Council jointly with the Commission conclude the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws.

PROPOSAL FOR A COUNCIL DECISION

concluding the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws

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THE COUNCIL OF THE EUROPEAN UNION,

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, in particular Articles 65 and 66,

Having regard to the Treaty establishing the European Community, and in particular Article 87 read in conjunction with Article 228(3), first indent,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas, given the increasingly pronounced international dimension of competition problems, international cooperation in this field should be strengthened;

Whereas, to this end, the Commission has negotiated an Agreement with the Government of the United States of America on the application of the competition rules of the European Communities and of the United States of America;

Whereas, the Agreement negotiated by the Commission and the Government of the United States of America regarding cooperation on competition law should be approved,

HAS DECIDED AS FOLLOWS:

ARTICLE 1

The Agreement between and the European Communities and the Government of the United States of America regarding the application of their competition laws is hereby approved on behalf of the European Coal and Steel Community and the European Community.

The text of the Agreement is attached to this Decision.

ARTICLE 2

The President of the Council will lodge the notification provided for in Article XI of the Agreement on behalf of the European Community. The President of the Commission will lodge the said notification on behalf of the European Coal and Steel Community.

Done at Brussels,

For the Council
The President

For the Commission
The President

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Statement by the Commission

In order to provide the Member States with sufficient information on the content of the information exchanged under the Agreement between the European Communities and the Government of the United States of America and the Commission of the European Communities regarding the application of their competition rules, the Commission will notify the Member State or Member States whose interests are affected by information sent to, or received from, the US competition authorities. For the purposes of this statement, any Member State in which one of the parties (or one of the companies controlling one of these parties) to a practice that is the subject of a notification has its headquarters will be regarded as having such an interest.

In addition, at meetings of government competition specialists to be held twice a year, the Commission will notify all the Member States of the information exchanged under the Agreement. This meeting will take place after the bilateral meetings with the US competition authorities provided for by the Agreement.

AGREEMENT
BETWEEN
THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING THE APPLICATION OF THEIR COMPETITION LAWS

The European Coal and Steel Community, and the European Community on the one hand, (hereinafter "the European Communities")

and

The Government of the United States of America, on the other hand,

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the European Communities and the United States of America;

Noting that the European Communities and the Government of the United States of America share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986;

and

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990;

Have agreed as follows:

Article I

PURPOSE AND DEFINITIONS

1. *The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.*

2. *For the purposes of this Agreement, the following terms shall have the following definitions:*

A. *"Competition law(s)" shall mean*

   (i) *for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) no. 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision no. 24-54, and*

   (ii) *for the United States of America, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11), and the Federal Trade Commission Act (15 U.S.C. §§ 41-68, except as these sections relate to consumer protection functions),*

   as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for purposes of this Agreement;

B. *"Competition authorities" shall mean (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;*

C. *"Enforcement activities" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party;*

   and

D. *"Anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.*

Article II

NOTIFICATION

1. *Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.*

2. *Enforcement activities as to which notification ordinarily will be appropriate include those that:*

   a) *Are relevant to enforcement activities of the other Party;*

   b) *Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;*

   c) *Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;*

   d) *Involve conduct believed to have been required, encouraged or approved by the other Party; or*

   e) *Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.*

3. *With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:*

   a) *In the case of the Government of the United States of America,*

      (i) *not later than the time its competition authorities request, pursuant to 15 U.S.C. § 18a(e), additional information or documentary material concerning the proposed transaction,*

      (ii) *when its competition authorities decide to file a complaint challenging the transaction, and*

      (iii) *where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and*

   b) *In the case of the Commission of the European Communities,*

      (i) *when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under*

Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

(ii) *when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation no. 4064/89, and*

(iii) *far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.*

4. *With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of*

(a) *the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America, and*

(b) *the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America,*

to enable the other Party's views to be taken into account.

5. *Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to*

a) *regulatory or judicial proceedings that are public,*

b) *intervention or participation that is public and pursuant to formal procedures, and*

c) *in the case of regulatory proceedings in the United States, only proceedings before federal agencies.*

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. *Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.*

Article III

EXCHANGE OF INFORMATION

1. *The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II, paragraph 5.*

2. *In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.*

3. *Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.*

4. *Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.*

Article IV

COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. *The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.*

2. *In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:*

   a) *the opportunity to make more efficient use of their resources devoted to the enforcement activities;*

   b) *the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;*

   c) *the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and*

   d) *the possibility of reducing costs incurred by persons subject to the enforcement activities.*

3. *In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.*

4. *Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.*

Article V

COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. *The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.*

2. *If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.*

3. *Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.*

4. *Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.*

Article VI

AVOIDANCE OF CONFLICTS OVER ENFORCEMENT ACTIVITIES

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. *While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.*

2. *A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.*

3. *Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accomodation of the competing interests:*

    a) *the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;*

    b) *the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;*

    c) *the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;*

    d) *the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;*

    e) *the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and*

f) *the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.*

Article VII

CONSULTATION

1. *Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.*
   These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. *In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.*

Article VIII

CONFIDENTIALITY OF INFORMATION

1. *Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.*

2. *Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.*

Article IX

EXISTING LAW

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states.

Article X

COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI

ENTRY INTO FORCE, TERMINATION AND REVIEW

1. *This Agreement shall be approved by the Parties in accordance with their respective internal procedures.*

   The Parties shall notify one another of the completion of those procedures.

2. *This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.*

3. *The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved.*
The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.

The undersigned, being duly authorized, have signed this Agreement.

Done at Washington, in duplicate, this twenty-third day of September 1991, in the English language

FOR THE COUNCIL OF THE EUROPEAN UNION

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE COMMISSION OF THE EUROPEAN COMMUNITIES :

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